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PROCEEDINGS AND ORDERS DATE: 051585

CASE NBR 84-1-01427 CFX
SHORT TITLE Simon, Steven
VERSUS Kroger Co., et al.

DOCKETED: Mar 5 1985

Date	Proceedings and Orders
Mar 5 1985	Petition for writ of certiorari filed.
Apr 3 1985	DISTRIBUTED. April 19, 1985
Apr 3 1985	Brief of respondent General Teamsters Local 528 in opposition filed.
Apr 5 1985	Brief of respondent Kroger Co. in opposition filed.
Apr 22 1985	REDISTRIBUTED. April 26, 1985
Apr 29 1985	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan and Justice Marshall join. (Detached opinion.)

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84-1427

No. .....

In The

Supreme Court of the United States

October Term, 1984

STEVEN D. SIMON,

Petitioner,

v.

THE KROGER COMPANY and
GENERAL TEAMSTERS LOCAL 528,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In a federal question judicial proceeding, involving a federal statute of limitations, does the commencement of a civil action pursuant to Rule 3 of the Federal Rules of Civil Procedure toll the applicable statute of limitations.

II. More specifically, did the Eleventh Circuit err as a matter of law in ruling that the Plaintiff Simon's Complaint for breach of collective bargaining agreement/unfair representation was barred by the six month statute of limitations set out in 29 U.S.C. § 160(b) and applied to these actions in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281 (June, 1983), because the Defendants were not served with his Complaint within the six month period although the Complaint was filed with the District Court within that limitations time.

III. Did the Eleventh Circuit err as a matter of law in ruling that the Defendant Kroger Company's Motion for Summary Judgment on the statute of limitations issue set out above was "unopposed" pursuant to Local Rule 91.2 of the District Courts of the Northern District of Georgia because the Plaintiff Simon's response in opposition was not filed within twenty days after service of the Motion as prescribed by that rule, and in granting the Motion on this secondary basis when the Plaintiff Simon had in fact filed a response in opposition to the Motion two months after the Motion was served and three weeks prior to the time the District Court ruled on the same and when there was no ruling, claim by Kroger or hint in the record that the delay was in bad faith or that the Plaintiff had caused any other delays in the case.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, STEVEN D. SIMON, (hereinafter referred to as "Simon"), respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit rendered in this case.

OPINIONS BELOW

The Petitioner requests that the Supreme Court review the opinion of the United States Court of Appeals for the Eleventh Circuit rendered in his case. This opinion is reported at 743 F.2d 1544 (1984) and a copy is attached hereto as Appendix A.

The opinion and judgment of the Eleventh Circuit affirmed the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division. The Orders on which the trial court's judgment was based are attached hereto as Appendices B, C and D.

A copy of the Eleventh Circuit's judgment affirming the District Court's judgment and the Eleventh Circuit's Order denying Simon's Petition for Rehearing are attached hereto as Appendices E and F.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was rendered in this case on October 15, 1984. Simon filed a timely Petition for Rehearing which was denied on December 6, 1984. This Petition for Writ of Certiorari was filed within 90 days of December 6, 1984, as is required by 28 U.S.C. §2101(c) and Rule 20 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES, REGULATIONS AND RULES INVOLVED

I. NATIONAL LABOR RELATIONS ACT §10(b), 29 U.S.C. §160(b).

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a Complaint stating the charges in that respect, and containing a Notice of Hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not five days after the serving of said Complaint: *Provided,* That no Complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made . . .

II. 29 C.F.R. §102.113(a).[1]

> The date of service shall be the day when the matter served is deposited in the United States Mail or is delivered in person as the case may be.

III. RULE 3 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

> A civil action is commenced by filing a complaint with the Court.

IV. RULE 4(c), and (d) (1)-(3) and (7) OF THE FEDERAL RULES OF CIVIL PROCEDURE (eff. Sept. 16, 1938).

This Rule along with its amended version cited below which define the service requirements for Complaints filed

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[1] This regulation governs the service requirements of administrative complaints filed with the N.L.R.B. pursuant to 29 U.S.C. § 160(b). *N.L.R.B. v. Local 264,* 529 F.2d 778, 784 (8th Cir. 1976).

in federal question judicial proceedings are too lengthy to be quoted here, but are set out verbatim in Appendices G and H.

V. RULE 4(c) (2) (C) and (D), and (d) (1)-(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE (as amended Jan. 12, 1983, eff. Feb. 26, 1983).

See Appendix H.

VI. LOCAL RULE 91.2, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA.

> Each party opposing the motion shall serve and file a response, reply memorandum, affidavit or other responsive material not later than ten days after service of the motion, except that in cases of motions for summary judgment the time shall be twenty days after the service of the motion. Failure to file a response shall indicate that there is no opposition to the motion.

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STATEMENT OF THE CASE

I. The Relevant Facts.

This case is before this Court on issues of law which involve only a few undisputed facts. Mr. Simon was employed by The Kroger Company (hereinafter referred to as "Kroger") from September 6, 1978 through February 18, 1982, and during this time was a member of General Teamsters Local 528 (hereinafter referred to as "Local 528"). (R-12, 13, 20) On February 18, 1982, Mr. Simon was terminated by Kroger, and contesting his termination, filed a grievance through Local 528. This grievance was carried through the first steps of the grievance procedure, but was not certified to arbitration. The final hearing on

the grievance was held on May 25, 1982. A decision by Kroger and Local 528 withdrawing Mr. Simon's grievance was issued sometime following the May 25, 1982 hearing, and Mr. Simon was notified of that decision on July 6, 1982. (R-39, 40, 203, 204)

II. The Proceedings Below.

Mr. Simon filed a Complaint against Kroger and Local 528 in the United States District Court for the Northern District of Georgia, Atlanta Division on January 3, 1983, within six months of the date he was notified that his grievance had been withdrawn. In this Complaint, he alleged that Kroger had breached the collective bargaining agreement in effect between it and Local 528 as it pertained to Mr. Simon by terminating him, and that Local 528 had failed to fairly represent him in the grievance procedure which was initiated to protest the termination. (R-2, 3) The District Court had federal question jurisdictation over this case pursuant to 29 U.S.C. §185(a) and (b).

Kroger was served with the Complaint by the United States Marshal on January 12, 1983, and Local 528 was served by the United States Marshal on January 26, 1983, both pursuant to Rule 4 of the Federal Rules of Civil Procedure. (R-10, 11) All parties proceeded with discovery, and on July 5, 1983, Kroger filed a Motion for Summary Judgment. The basis of Kroger's Motion was that the Complaint was barred by the six month statute of limitations set out in 29 U.S.C. §160(b) which was applied to cases such as this in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 76 L. Ed.2d 476 (June, 1983). Specifically, Kroger argued that although the Plaintiff's Complaint was filed within the six

month limitations period, it was not served within that period, and was therefore time barred. (R-30, 134)

On September 6, 1983, Mr. Simon filed brief in response to Kroger's Motion for Summary Judgment, admitting the facts upon which Kroger relied but opposing its interpretation of 29 U.S.C. §160(b) as requiring service in addition to filing within the six month limitations period. (R-139) On September 28, 1983, the District Court entered an order granting Kroger's Motion for Summary Judgment on two grounds. First, it ruled that although the Complaint was filed within six months of the accrual of the cause of action, it was not served within that time period and therefore was barred by the six month statute of limitations. Secondly, it ruled that the Motion was "unopposed" because a response in opposition had not been filed within the twenty day period called for Local Rule 91.2. There was no ruling by the District Court, claim by Kroger or hint in the record that this delay was caused by bad faith activity by the Plaintiff Simon or that he had caused any other delay whatsoever in the proceedings. (R-157, 267)

On October 24, 1983, Local 528 filed a Motion for Summary Judgment stating that the Complaint was also barred by the six month statute of limitations as to it. (R-173) On January 23, 1984, the District Court issued an order granting Local 528's Motion for Summary Judgment stating that although the Complaint was filed within six months after the accrual of the cause of action, it was barred by the applicable statute of limitations because it was not served within that period. (R-271)

On February 24, 1984, Mr. Simon filed a Notice of Appeal, appealing the judgment of the District Court dismissing his Complaint as to both Kroger and Local 528. (R-275) The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment on October 15, 1984, and denied Mr. Simon's Petition for Rehearing on December 6, 1984. (see Appendices A and F) The Eleventh Circuit had jurisdiction over this case pursuant to 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

I. The Issue Of Whether Filing A Complaint In A District Court In A Breach Of Collective Bargaining Agreement/Unfair Representation Case Tolls The Statute Of Limitations Set Out In 29 U.S.C. § 160(b) Has Never Been Decided By The Supreme Court, And Because It Is An Important Question Of Federal Law Which Is Now Being Addressed For The First Time In The United States Courts Of Appeals, The Supreme Court's Guidance Is Needed.

The Eleventh Circuit is the only Circuit Court that has ruled on this issue at this time.[2] However, as the Eleventh Circuit has ruled on this issue in the same manner three times[3], the other circuits may well follow this

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[2] A Tennessee District Court has ruled that pursuant to Rule 3 of the Federal Rules of Civil Procedure, the statute of limitations set out in 29 U.S.C. § 160(b) is tolled at the time the breach of collective bargaining agreement/unfair representation suit is filed, and a California District Court has ruled in accord with the Eleventh Circuit in the instant case. *Williams v. E.I. duPont deNemours Company*, 581 F. Supp. 791 (D.C. Tenn., 1983); *Hoffman v. United Markets, Inc.*, 117 L.R.R.M. 3229 (D.C. Calif., 1984).

[3] These cases are the case which is the subject of this Petition, *Howard v. Lockheed-Georgia Company, et al.*, 742 F.2d 612 (11th Cir., 1984) and *Dunlap v. Lockheed-Georgia Company, et al.*, Case No. 84-8329 (11th Cir., 1984). *Howard* and *Dunlap* are currently pending before the Eleventh Circuit on a Petition for Rehearing by the Panel and Suggestion for Rehearing En Banc.

lead. Therefore if this Court agrees that the Eleventh Circuit's opinion in this case is erroneous, as is discussed below, the same should be established now before plaintiffs in breach of collective bargaining agreement/unfair representation actions are deprived of the benefits of the six month statute of limitations this Court granted them. *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

A. The Eleventh Circuit's Opinion In This Case Is In Conflict With The General Procedural Rule Adopted By All The Circuits That Have Ruled On The Same That The Filing Of A Complaint In A Federal Question Case Involving A Federal Statute Of Limitations Tolls The Applicable Statute Of Limitations Pursuant To Rule 3 Of The Federal Rules Of Civil Procedure.

In June of 1983, this Court borrowed the six month statute of limitations set out in 29 U.S.C. §160(b) and applied it to federal question, breach of collective bargaining agreement/unfair representation cases. *DelCostello,* supra. In doing so, this Court applied a statute that was drafted to govern administrative proceedings before the National Labor Relations Board to judicial proceedings without providing the guidelines for its practical application in the courts. As a result, the Eleventh Circuit has applied the terms of this statute in this case and in two others in a literal manner that is in conflict with both the stated intent of *DelCostello* to provide plaintiffs in cases such as this with a full six months to bring their actions and the rule that has been established by all the Circuits that have all ruled on the same that the filing of a complaint in a federal question case employing a federal statute of limitations tolls the applicable statute of limitations pursuant to Rule 3 of the Federal Rules of Civil Procedure.

Specifically, the Eleventh Circuit stated in its opinion rendered in this case that "we find that the intent, spirit and plain language of §10(b) [29 U.S.C. §160(b)] requires that a complaint be both filed and served within the six month limitations period." *Simon,* supra, at 1546. By the statute's "plain wording," the Eleventh Circuit was referring to the provision in 29 U.S.C. §160(b) which states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board and the service of the copy thereof upon the person against whom the charge is made. . . ." However, in speaking to the "intent" and "spirit" of the statute, the Eleventh Circuit completely ignores the fact that the statute was drafted to apply to N.L.R.B. proceedings in which "service" means something completely different than in judicial proceedings which are governed by the Federal Rules of Civil Procedure.

In N.L.R.B. proceedings, service is completed at the time the complaint referred to in 29 U.S.C. §160(b) is placed in the mail. No actual notice or personal delivery is necessary. 29 C.F.R. §102.113(a). Although all the Circuits require service in N.L.R.B. proceedings within the six month limitations period set out in the statute, service under 29 C.F.R. §102.113(a) can be controlled totally by the plaintiff and without exception accomplished almost simultaneously with the filing of the Complaint. Thus, a plaintiff in an N.L.R.B. proceeding governed by 29 U.S.C. §160(b) has the advantage of the full six month limitations period in which to file his complaint. *N.L.R.B. v. Local 264, Labor's International Union,* 529 F.2d 778, 784 (8th Cir. 1976)

However, in a breach of collective bargaining agreement/unfair representation judicial proceedings, the re-

quirements of Rule 4 of the Federal Rules of Civil Procedure must be complied with before service is accomplished. Under both Rule 4 as it was in effect when Mr. Simon's case was filed and Rule 4 as it has been amended, personal service on or acknowledgment by the defendant is required. (see Appendices G and H) Thus, the most diligent plaintiff remains at the mercy of the defendant as to exactly when service will be completed. In this particular case, service by the U.S. Marshal was requested at the time the Complaint was filed on January 3, 1983, as was then required under Rule 4 of the Federal Rules of Civil Procedure, but the U.S. Marshal was unable to perfect service on Local 526 until January 25, 1983.

In large part so that defendants could not control whether a Complaint would be time barred under a statute of limitations, all the Circuits that have ruled on the issue have held that the filing of a Complaint pursuant to Rule 3 of the Federal Rules of Civil Procedure in a federal question case governed by a federal statute of limitations tolls the running of the statute of limitations. *Hobson v. Wilson,* 737 F.2d 1, 44, 45 (D.C. Cir. 1984); *Caldwell v. Martin-Marietta Corporation,* 632 F.2d 1184, 1188 (5th Cir. 1980); *United States v. Wahl,* 583 F.2d 285, 289 (6th Cir. 1978); *Moore Company v. Sid Richardson Carbon and Gas Company,* 347 F.2d 921 (8th Cir.), cert. denied, 383 U.S. 925, 86 S.Ct. 927, 15 L.Ed.2d 845 (1964); *Messenger v. U.S.,* 231 F.2d 238 (2nd Cir. 1956); *Isaacks v. Jeffers,* 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S.Ct. 270, 89 L.Ed. 624 (1944). Although this Court has never ruled directly on this point, it has strongly indicated its agreement with the above rule in a footnote to a diversity case in which it stated, "the court suggested

in *Ragan* that in suits to enforce rights under federal statute, Rule 3 means that the filing of the complaint tolls the applicable statute of limitations." *Walker v. Armco Steel Corporation,* 446 U.S. 740, Fn. 11, 100 S.Ct. 1979, Fn. 11 (1980), citing *Ragan v. Merchants Transfer and Wholesale Company, Inc.,* 337 U.S. 530, 533, 69 S.Ct. 1233, 1235 (1949).[4]

Rule 1 of the Federal Rules of Civil Procedure states that "these rules govern the procedure in the United States District Courts in all suits of a civil nature . . ." Therefore, although Congress did not intend for 29 U.S.C. §160(b) to be applied to judicial proceedings or for the Federal Rules of Civil Procedure to be applied to it, now that the statute has been applied to judicial proceedings by this Court, it should be applied consistently with the Federal Rules of Civil Procedure. As is discussed above, Rule 3 of the Federal Rules of Civil Procedure, as applied to federal question cases involving federal statutes of limitations such as the instant case, tolls the running of the statute of limitations while service is being perfected pursuant to Rule 4 of the Federal Rules of Civil Procedure. To permit the Eleventh Circuit's opinion in this case to stand, would result in a conflict with both Rules 1 and 3 of the Federal Rules of Civil Procedure. Further, and more importantly, as is discussed below, the Eleventh

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[4] This rule protects the plaintiff from an uncooperative defendant, while the defendant is protected from a non-diligent plaintiff under Rule 41(b) of the Federal Rules of Civil Procedure which allows the defendant to move for a dismissal of the plaintiff's case for the failure of the plaintiff to prosecute by completing service within a reasonable time and Rule 4(j) of the Federal Rules of Civil Procedure (as amended Jan. 12, 1983) which puts a time limit of One Hundred Twenty (120) days on the plaintiff to complete service on the defendant unless good cause is shown why he cannot do so. See *Caldwell,* supra at 1188.

Circuit's opinion in this case directly and adversely affects the intended result of *DelCostello* to provide plaintiffs in breach of collective bargaining agreement/unfair representation cases a full six months to file their cases.

B. The Eleventh Circuit's Opinion In This Case Will Yield Results That Are In Conflict With And Contrary To The Specific Language And Intent Of This Court's Opinion In DelCostello.

In *DelCostello,* this court overruled its holding in *United Parcel Services Inc. v. Mitchell,* 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981). *Mitchell* held that the state statutes of limitations that govern the appeal of arbitration awards would provide the appropriate statutes of limitations for breach of collective bargaining agreement/unfair representations cases. Noting that the majority of these state limitations periods were ninety (90) days, this Court stated in *DelCostello,* supra at 2291:

> We conclude that state limitations periods for vacating arbitration awards would fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under §301 and the fair representation doctrine.

Explaining why a longer limitations period was necessary, this Court added:

> In the labor setting, . . . the employee will often be unsophisticated in collective bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not an issue in the arbitration proceeding, and to frame his suit. Yet state arbitration statutes typically provide very short times in which to sue for vacation of arbitration awards.

Obviously, this Court thought the additional ninety (90) days provided by the six month limitations period in 29 U.S.C. §160(b) was necessary for the protection of plaintiffs' rights in these cases and of sufficient significance to write a second opinion on the same issue in a two and one-half year period. However, the Eleventh Circuit's opinion in the instant case, by requiring service within the six month period, shortens the limitations period by the amount of time it takes to perfect service which can be considerable if the defendant does not cooperate. It appears that the practical effect of the Eleventh Circuit's ruling will be to reduce the six month statute of limitations close to the ninety (90) day limitations period which was specifically determined to be too short in *DelCostello,* and to allow defendants to control its actual length by refusing to cooperate in service efforts.

The fact that this result is in conflict with the *DelCostello* opinion can be further seen by this Court's referencing the time Mr. DelCostello's and Mr. Flower's Complaints were "filed" when computing the statute of limitations as to them, and not the date the defendants in those cases were served. Therefore, as the Eleventh Circuits's opinion in *Simon* appears to be in direct conflict with the language and intent of *DelCostello,* this Court should grant the Petition for Writ of Certiorari to clarify its intentions as to the application of 29 U.S.C. §160(b) to breach of collective bargaining agreement/unfair representation cases.

II. In Ruling That The Defendant Kroger Company's Motion For Summary Judgment On The Statute Of Limitations Issue Should Be Granted

On The Secondary Ground That The Plaintiff Simon Did Not File His Opposition Brief Within The Twenty Days Provided In The Local Rule When He Did File A Response Brief And When There Was No Ruling, Claim By Kroger Or Hint In The Record That The Delay Was Caused By Bad Faith Or That The Plaintiff Simon Had Caused Any Other Delays In The Case, The Eleventh Circuit Has Departed From The Holdings Of Every Other Circuit That Has Ruled On This Issue, And Has Departed From The Principle Espoused By The Supreme Court That Federal Procedural Rules Are To Be Utilized To Reach Decisions On The Merits And Not For Summary Dismissals For Technical Violations.

This Court has ruled that "the basic purpose of the Federal Rules of Civil Procedure is to administer justice through fair trials, not through summary dismissals." *Surowitz v. Hilton Hotel Corporation,* 383 U.S. 363, 86 S.Ct. 845, 851 (U.S. Ill. 1966) In this regard, every Circuit Court that has ruled on the issue of when a case may be dismissed with prejudice on grounds that do not pertain to the merits, such as a failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure or a violation of a local rule, has held that a dismissal with prejudice is a drastic remedy to which a District Court should resort only in extreme situations where there is a clear record of delay or contumacious conduct by the plaintiff and absent such a showing, the District Court's discretion should be limited to the application of lesser sanctions designed to achieve compliance with court orders and to expedite proceedings. *Theilmann v. Rutland Hospital, Inc.,* 455 F.2d 853 (2nd Cir., 1972); *Madesky v. Campbell,* 705 F.2d 703 (3rd Cir., 1983); *Davis v. Williams,* 588 F.2d 69 (4th Cir., 1978); *McGowan v. Faulkner Concrete Pipe Company,* 659 F.2d 554 (5th Cir., 1981);

Luna v. I.A.M. Local 36, 614 F.2d 529 (5th Cir., 1980); *Arundar v. DeKalb County School District,* 620 F.2d 493 (5th Cir., 1980); *Greater Baton Rouge Golf Association v. Recreation and Park Commission,* 507 F.2d 227 (5th Cir., 1975); *Eggleston v. Local 130,* 657 F.2d 890 (7th Cir., 1981); *Garrison v. International Paper Company,* 714 F.2d 757 (8th Cir., 1983); *Navarro v. Chief of Police, Des Moines,* 523 F.2d 214 (8th Cir., 1975); *Welsh v. Automatic Poultry Feeder Company,* 439 F.2d 95 (8th Cir., 1971); *Davis v. Operation Amigo, Inc.,* 378 F.2d 101 (10th Cir., 1967); *State Exchange Bank v. Hartline,* 693 F.2d 1350 (11th Cir., 1982).

In Mr. Simon's case, there was absolutely no claim by Kroger, indication in the record or ruling by the District Court of bad faith, violations of any court orders, or any other delays occasioned by the Plaintiff. He simply filed his response brief six weeks later than called for in the local rule because of the difficulty of the novel question of law presented in Kroger's Motion for Summary Judgment. Further, the District Court did not rule on Kroger's Motion until three weeks after Mr. Simon's response had been filed.

Comparing the instant case with the ruling of the Fifth Circuit (now the Eleventh Circuit) in *Ramsey v. Signal Delivery Service, Inc.,* 631 F.2d 1210 (5th Cir., Ga. 1980) demonstrates the sharp departure the Eleventh Circuit has taken from its previous rulings on this issue which are in accord with the other Circuit Court decisions listed above. In *Ramsey,* on January 27, 1978, the Defendant filed Motions to Dismiss and on April 28, 1978, the District Court granted the Defendant's Motions to Dismiss because "they are unopposed." In reversing the

District Court, the Fifth Circuit stated "before a trial judge dismisses a complaint with prejudice, there should be a clear record of delay or contumacious conduct, and a finding that lesser sanctions would not serve the system of justice. . . . The three month delay between the filing of the Defendant's Motions to Dismiss and Entry of Judgment against the Plaintiff did not constitute the type of extreme delay to which the court referred." *Ramsey,* supra at 1214.

The *Ramsey* case is directly on point with the instant case, with the exception that Mr. Simon filed a response in opposition to Kroger's Motion three weeks prior to the time the District Court entered its ruling that the Motion was "unopposed." This would make Mr. Simon's case even more appropriate for reversal on this point than *Ramsey.* In its opinion in Mr. Simon's case, the Eleventh Circuit did not reverse, distinguish or even mention *Ramsey,* or any of the other Circuit cases cited above. Further, it cited no cases whatsoever in support of its proposition granting the Defendant's Motion for Summary Judgment against Mr. Simon because of his late filed brief.

Therefore, as *Simon* is a quiet but significant departure from the long established federal procedural rule favoring a resolution of cases on their merits, this Court should bring the Eleventh Circuit back into line with its previous rulings before *Simon* becomes accepted precedent.

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CONCLUSION

On the basis of the foregoing, a Writ of Certiorari should issue to review the opinion and judgment of the Court in *Simon v. The Kroger Company, et al.,* 743 F.2d 1544 (11th Cir., Ga. 1984).

Respectfully submitted,

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March 5, 1985

APPENDIX A

STEVEN D. SIMON,

Plaintiff-Appellant,

vs.

KROGER COMPANY,
General Teamsters Local 528,

Defendants-Appellees.

No. 84-8168

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Oct. 15, 1984.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

In this breach of contract/breach of duty of fair representation case, we review the district court's orders granting appellees, Kroger Company and General Teamsters Local 528, motions for summary judgment. We affirm.

Facts

From September 6, 1978, through February 18, 1982, appellant, Steven D. Simon, was employed by appellee, The Kroger Company (Kroger), and was a member of appellee, General Teamsters Local 528 (Union or Local

528). On February 18, 1982, Kroger terminated Simon. The Union processed this grievance and a final hearing was held on May 25, 1982. The grievance, however, was not certified to arbitration. The Union notified Simon of this decision on July 6, 1982.

On January 3, 1983, Simon filed his complaint in the United States District Court for the Northern District of Georgia, alleging (1) that Kroger had breached its collective bargaining agreement by discharging him, and (2) that the Union had violated its duty of fair representation by failing to represent him properly in connection with his grievance.

On January 12, 1983, more than six months after Simon had been notified of the denial of his grievance, he served a copy of his complaint on Kroger. On January 25, 1983, he served a copy of the complaint on Local 528. The district court granted Kroger's motion for summary judgment. In doing so, the court first noted that the motion was "unopposed" because Simon had not filed a brief in opposition within the twenty-day time period provided for in Local Rule 91.2. Second, the court ruled that the complaint, although filed within six months of the accrual of the cause of action, was barred by the six-month statute of limitations because it was not served within that time period.

Local 528 filed a motion for summary judgment on the ground that the cause of action was barred by the six-month statute of limitations. The district court granted Local 528's motion for summary judgment holding that the cause of action was time barred because the complaint was

not served within the six-month statute of limitations. This appeal ensued.

Issues

On appeal, we must determine: (1) whether the district court properly granted appellees' motions for summary judgment on the ground that Simon failed to make timely service of the complaint under section 10(b) of the National Labor Relations Act, 29 U.S.C.A. § 160(b) (West 1973); and (2) whether the district court erred in granting Kroger's motion for summary judgment on the secondary ground that the motion was "unopposed" because Simon failed to file a timely response as required by Local Rule 91.2.

Discussion

A. Statute of Limitation

Appellant, Simon, contends that the district court erred as a matter of law in granting appellees' motions for summary judgment on the ground that Simon's complaint was time barred because it was not *served* within the six-month period set forth in 29 U.S.C.A. § 160(b) (West 1973). Recently, the Supreme Court in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), held that the six-month statute of limitations under section 10(b) of the National Labor Relations Act, 29 U.S.C.A. § 160(b) (Act), controls a hybrid breach of contract/duty of fair representation claim.

In this hybrid action, we must determine whether the six-month limitations period articulated in 29 U.S.C.A. § 160(b) and espoused by the Court in *Del Costello* man-

dates that a timely complaint be both filed and served within the relevant six-month period. The district court's conclusions of law rendered by means of summary judgment are subject to the same standard of review as any question of law raised on appeal. *Morrison v. Washington County, AL.*, 700 F.2d 678, 682 (11th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 195, 78 L.Ed.2d 171 (1984).

Section 10(b) of the National Labor Relations Act, 29 U.S.C.A. § 160(b), provides, in pertinent part:

> That no complaint shall issue based upon any unfair labor practice occurring more than *six months* prior to the *filing* of the charge with the Board *and* the *service of a copy thereof upon the person against whom such charge is made,* unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. [Emphasis added.]

Both parties agree that section 10(b) of the Act governs this hybrid breach of contract/duty of fair representation case. Additionally, it is undisputed that the complaints in question were filed but not served within the applicable six-month period. We find that the intent, spirit, and plain language of section 10(b) require that a complaint be both filed and served within the six-month limitations period. Accordingly, we hold that the district court correctly concluded that Simon's complaint, served outside of the six-month limitations period, was time barred under 29 U.S.C.A. § 160(b).

B. Local Court Rule 91.2

Local Court Rule 91.2 provides that a response to a motion for summary judgment must be filed within twenty

days and that "failure to file a response shall indicate that there is no opposition to the motion." The district court held that Kroger was entitled to summary judgment on the secondary ground that Simon failed to respond to Kroger's motion for summary judgment until almost three months after a response was required under Local Court Rule 91.2. Simon, although filing an untimely response, did not seek an extension of time or leave to file his response late. The district court, therefore, concluded that Kroger's motion for summary judgment was "unopposed," within the meaning of Local Court Rule 91.2. Finding no opposition to Kroger's motion, the court granted the motion.

We hold that the district court properly applied Local Court Rule 91.2 and the six-month statute of limitations articulated in section 10(b) of the National Labor Relations Act, 29 U.S.C.A. § 160(b). Finding no error, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C83-004A

STEVEN D. SIMON

vs.

THE KROGER COMPANY and
GENERAL TEAMSTERS LOCAL 528

ORDER

Plaintiff in this action alleges (1) that the discharge of the plaintiff by defendant Kroger Company constituted a breach of the collective bargaining agreement in force between Kroger and defendant General Teamsters Local 528 (union defendant), and (2) that at the time of the plaintiff's discharge, the union defendant breached its duty of fair representation of the plaintiff. The action is before the court on the motion of defendant Kroger for summary judgment. Plaintiff has filed no response to the instant motion,[1] which the court therefore may deem unopposed. Local Court Rule 91.2.

---

[1] Plaintiff's brief in opposition to Kroger's motion for summary judgment was filed in this court on September 6, 1983, almost three months after the filing of Kroger's motion and almost two months after the filing of Kroger's Supplemental brief, in which Kroger supplemented its motion in light of the Supreme Court's decision in *DelCostello v. International Brotherhood of Teamsters,* 103 S.Ct. 2281 (1983). Plaintiff has offered no explanation for the delay, and because the plaintiff's brief is thus untimely under Local Court Rule 91.2, and Kroger's motion is deemed unopposed.

Even if the plaintiff's response were considered timely, the court has reviewed the plaintiff's arguments and finds them to be without merit.

Because the motion is unopposed, and because it appears from defendant Kroger's uncontroverted statement of facts that the complaint in this action was served on defendant Kroger after the running of the applicable statute of limitations, *see DelCostello v. International Brotherhood of Teamsters,* 103 S.Ct. 2281 (1983), the court will grant the instant motion.

Also before the court is the joint motion of Frederick McLam and Frank Shuster for substitution of counsel for the union defendant. The court will grant the motion.

Accordingly, the motion of defendant Kroger for summary judgment is GRANTED. The motion of Frederick McLam and Frank Shuster for substitution of counsel is GRANTED. The clerk will enter the name of Frank Shuster as attorney of record for the union defendant. This action will continue as to the union defendant.

SO ORDERED, this 27th day of September, 1983.

/s/ Richard C. Freeman
UNITED STATES DISTRICT JUDGE

FILED IN CLERK'S OFFICE
September 28, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. C-83-04-A

STEVEN D. SIMON

vs.

GENERAL TEAMSTERS LOCAL 528

ORDER

This action is before the court on the plaintiff's motion for reconsideration of this court's order of September 27, 1983, granting the motion of defendant Kroger for summary judgment. In that order, the court held that defendant Kroger was entitled to summary judgment for two reasons: first, the plaintiff failed to respond to defendant Kroger's motion until almost three months after a response was required under Local Court Rule 91.2 and more than two months after the filing of defendant Kroger's supplemental brief. Second, because the plaintiff failed to make timely service of the complaint, this action is barred by the applicable statute of limitations.

Plaintiff's counsel asserts that the lengthy delay in indicating opposition resulted from a decision to wait until he had "thoroughly familiarized himself with the law and facts" in order to submit "a well thought out response" and "to not burden the system with meritless propositions." Plaintiff has not, however, offered an explanation for his failure to seek an extension of the response time or leave to file an untimely response. Local Court Rule 91.2 provides that a response to a summary judgment motion must

be filed within twenty days and that "[f]ailure to file a response shall indicate that there is no opposition to the motion." Plaintiff argues that this rule merely allows the court to rule on a motion for summary judgment to which no response is filed, that the rule was established only "to allow the Court to move cases along," and that the court must consider the merits of a response that is filed prior to the time the motion is ruled on.

The court fully agrees with the proposition that the local rules must be interpreted in accordance with "the spirit of the federal practice . . . to accord substantial justice over mere technical contentions." *Hartley & Parker, Inc. v. Florida Beverage Corporation,* 348 F.2d 161 (5th Cir. 1965). Nevertheless, the plaintiff's apparently conscious decision to delay its response for more than two months strains the spirit of the federal rules to, if not beyond, the breaking point. In any event, regardless of whether the court must consider the plaintiff's untimely response, as this court noted in its previous order the arguments raised in the plaintiff's response are without merit.

In support of its motion for summary judgment, defendant Kroger demonstrated without contradiction that the plaintiff filed but did not serve his complaint within six months after the accrual of the cause of action. The general rule expressed in *Caldwell v. Martin Marietta Corp.,* 632 F.2d 1184 (5th Cir. 1980), that the mere filing of a complaint tolls the running of the statute of limitations in an action based on federal law governs only when the applicable statute of limitations merely requires that an action be "brought," "commenced," or "initiated" within a specified time. The statute to be applied in the in-

stant case, section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b); *see DelCostello v. International Brotherhood of Teamsters,* 103 S. Ct. 2281 (1983), expressly requires *both* filing and service within six months, and thus the holding of *Caldwell* is inapposite to the instant dispute.

While it is true that the applicable statute of limitations has been "borrowed" for use in suits of this kind from a provision designed to apply in proceedings before the National Labor Relations Board (NLRB), there is no merit in the plaintiff's assertion that the requirement of service in section 10(b) is an administrative rule promulgated by the NLRB for administrative procedures. First, the service requirement is part of an express statutory provision. *NLRB v. Local 264, Laborers' International Union,* 529 F.2d 778, 782 (8th Cir. 1976) ("The statute is clear in providing that a charge must not only be filed, it must also be served within the prescribed six-month period."); *see* H.R. Rep. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. Code Cong. Serv. 1135, 1159 (Conference Committee Statement by House Managers) ("[Section 10(b)] requires that charges be filed, *and notice thereof be given,* within 6 months after the acts complained of have taken place.") (emphasis supplied). Section 10(b) was designed "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused' . . . and of course to stabilize existing bargaining relationships." *Local Lodge No. 1424 International Assoc. of Machinists v. NLRB,* 362 U.S. 411, 419, 80 S.Ct. 822, 828 (1960) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947)). As the Supreme Court

noted in *DelCostello,* federal law favors "the relatively rapid final resolution of labor disputes." 103 S.Ct. at 2292. Such policy considerations would be ill-served by a rule permitting the running of the statute of limitations to be tolled by mere filing. In such a case, only the very liberal rules regarding dismissal for want of prosecution, *see, e.g.,* Rule 40(b), Fed. R. Civ. P.; Local Court Rule 130, would require that a plaintiff prod the dispute toward resolution.

For the above reasons, the court adheres to its previous decision. Plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED this 22 day of December, 1983.

/s/ Richard C. Freeman
United States District Judge

FILED IN CLERK'S OFFICE
December 22, 1983

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C83-04A

STEVEN D. SIMON

vs.

THE KROGER COMPANY and
GENERAL TEAMSTERS LOCAL 528

ORDER

This action is before the court on the motion of defendant General Teamsters Local 528 (hereinafter "General Teamsters") for summary judgment, and on General Teamsters' motion to strike the plaintiff's request for a jury trial.

In previous orders entered in this action, this court has held that the applicable statute of limitations, section 10(b), of the National Labor Relations Act, 29 U.S.C. § 160(b), requires both filing and service of the complaint within six months after the plaintiff's cause of action has accrued. *See* Order of September 27, 1983 (granting motion of defendant Kroger for summary judgment); Order of December 22, 1983 (denying plaintiff's motion for reconsideration). It is beyond dispute that the plaintiff's cause of action accrued no later than July 6, 1982, and that the complaint was served on General Teamsters more than six months later, on January 25, 1983. Plaintiff's claim against General Teamsters is thus barred by the statute of limitations, and the court will grant the motion

for summary judgment. In light of this result, the motion to strike the plaintiff's jury demand is moot.

Accordingly, the motion of defendant General Teamsters for summary judgment is GRANTED. The clerk shall enter final judgment in this action.

SO ORDERED, this 31 day of January, 1984.

/s/ Richard C. Freeman
UNITED STATES DISTRICT JUDGE

FILED IN CLERK'S OFFICE
January 31, 1984

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8168

Non-Argument Calendar
D.C. Docket No. C83-0004A

STEVEN D. SIMON,

Plaintiff-Appellant,

vs.

KROGER COMPANY, GENERAL TEAMSTERS LOCAL 528,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 15, 1984
For the Court: Spencer D. Mercer, Clerk

By: Miquel J. Coy, Jr.
Deputy Clerk

ISSUED AS MANDATE: December 18, 1984

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8168

STEVEN D. SIMON,

Plaintiff-Appellant,

vs.

KROGER COMPANY, GENERAL
TEAMSTERS LOCAL 528,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion October 15, 11 Cir., 1984, — F.2d —).
(December 6, 1984)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph Hatchett
United States Circuit Judge

APPENDIX G

RULE 4(c), and (d)(1)-(3) and (7) OF THE FEDERAL RULES OF CIVIL PROCEDURE (eff. Sept. 16, 1938).

Rule 4 Process

(a) and (b) omitted

(c) By Whom Served. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon

any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(d)(4)-(6) omitted

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e)-(h) omitted

APPENDIX H

Rule 4(c)(2)(C) and (D), and (d)(1)-(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE (as amended Jan. 12, 1983, eff. Feb. 26, 1983).

Rule 4 Process

(a), (b), c(1), and c(2)(A) and (B) omitted

(c)(2)(C)A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender without twenty days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty days after mailing the notice and acknowledgment of receipt of summons.

c(2) (E), and c(3) omitted

(d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or incompetent person, by serving the summons and complaint in the manner prescribed by law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent, authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

d(4)-(6), (e)-(j) omitted

No. 84-1427

In The
Supreme Court of the United States
October Term, 1984

STEVEN D. SIMON,
Petitioner,

vs.

THE KROGER COMPANY and
GENERAL TEAMSTERS LOCAL 528,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT GENERAL TEAMSTERS LOCAL 528'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTE CIRCUIT

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Attorney for General Teamsters Local 528

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

Did the Eleventh Circuit correctly affirm the District Court's dismissal of Petitioner's hybrid breach of contract/breach of the duty of fair representation action based upon Petitioner's failure to satisfy the requirements of the applicable statute of limitations, 29 U.S.C. § 160(b)?

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No. 84-1427

In The

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RESPONDENT GENERAL TEAMSTERS LOCAL 528'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JURISDICTION

Respondent does not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

The Circuits are not in conflict concerning the need for a Plaintiff, in a breach of contract/breach of duty of

fair representation action to satisfy both the filing and service requirements imposed upon such actions by 29 U.S.C. § 160(b). The Eleventh Circuit has consistently required complete compliance with the requirements of 29 U.S.C. § 160(b) in actions of this type, *Simon v. The Kroger Company, et al.*, 743 F.2d 1544 (CA 11, 1984); *Howard v. Lockheed-Georgia Company, et al.*, 742 F.2d 612 (CA 11, 1984); *Dunlap v. Lockheed-Georgia Company, et al.*, Case Number 84-8329 (CA 11, 1984), and no other circuit has taken a contrary view.

Moreover, the decision of the Eleventh Circuit in the instant case correctly applied the rulings of this Court and no important question of Federal law is presented by the Petition.

The instant petition does not present a question which warrants discretionary review.

STATEMENT OF THE CASE

I.

The Relevant Facts

Petitioner was employed by Respondent The Kroger Company (hereinafter referred to as "Respondent Company") from September 6, 1978 through February 18, 1982. On February 18, 1982, Petitioner was discharged from employment with Respondent Company. Thereafter, Petitioner filed a grievance protesting his discharge. Respondent General Teamsters Local 528 (hereinafter referred

to as "Respondent Union") processed this grievance and a grievance hearing was held on March 25, 1982. A decision denying Petitioner's grievance was issued and received by Petitioner no later than July 6, 1982 (R. 39, 40, 203, 204).

II.

The Proceedings Below

On January 3, 1983, Petitioner filed his complaint in the United States District Court for the Northern District of Georgia alleging that Respondent Union had breached the duty of fair representation owing to Petitioner and that Respondent Company had discharged Petitioner in violation of the applicable collective bargaining agreement (R. 2, 3). Respondent Company was served with a copy of the complaint on January 12, 1983 and Respondent Union was served with a copy of the complaint on January 26, 1983 (R. 10, 11, 12, 19).

On June 10, 1983, Respondent Company filed a Motion for Summary Judgment which was amended on July 5, 1983. Respondent Company asserted, pursuant to the Court's decision in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), that the applicable statute of limitations for an action such as this is the limitations period prescribed by Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Respondent Company further contended that, inasmuch as Section 10(b) requires both filing and service of a complaint within six (6) months of accrual of the action to satisfy the limitations period, Petitioners complaint was time barred in that the Complaint was not served within six (6) months

of the date the cause of action accrued to Petitioner (R. 30, 134).

Petitioner responded to the above-described motions on September 6, 1983 (R. 139). On September 28, 1983, the District Court held that the applicable limitations period was Section 10(b) of the National Labor Relations Act and, since Petitioner had not satisfied the service requirements of said Section within the time allowed therein, the action was barred. The District Court also held that Respondent Company's Motion was unopposed in that Petitioner, without explanation, had failed to respond to Respondent Company's Motion within the time allowed by Local Rule 91.2 (R. 157, 267).

Thereafter, Petitioner, relying upon *Caldwell v. Martin Marietta Corporation,* 632 F.2d 1184 (5th Cir., 1980) moved the District Court for reconsideration of its Order dismissing the complaint. On December 22, 1983, the District Court denied Petitioner's Motion for Reconsideration by holding that the general rule expressed in *Caldwell v. Martin Marietta, supra,* was not applicable to the instant case due to the specific statutory requirements of Section 10(b) and the special policy considerations which gave rise to those requirements (R. 25).

On October 24, 1983, Respondent Union filed a Motion for Summary Judgment asserting, *inter alia,* that the complaint was barred by the applicable limitations period (R. 173). Petitioner responded to this motion on November 23, 1983 (R. 254). On January 23, 1984, the District Court granted Respondent Union's Motion by holding that Petitioner had failed to satisfy the service requirement of Section 10(b), 29 U.S.C. § 160(b) (R. 271).

On February 24, 1984, Petitioner filed a Notice of Appeal, appealing the judgment of the District Court dismissing his complaint as to both Respondents. The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment on October 15, 1984 and denied Petitioner's Petition for Rehearing on December 6, 1984.

REASONS FOR DENYING THE WRIT

A.

Summary of Argument

(1) The decision of the Eleventh Circuit in the instant case correctly applied the requirements of 29 U.S.C. § 160(b) to cases of this type and is not in conflict with the decisions of any other circuit or this Court.

(2) The Petition does not present any special or important questions of Federal law warranting discretionary review.

(3) The requirement that a Plaintiff satisfy both the filing and service requirements of 29 U.S.C. § 160(b) in a hybrid breach of contract/breach of duty of fair representation lawsuit is consistent with the underlying policy considerations favoring relatively rapid resolution of labor disputes.

(4) The cases relied upon by Petitioner do not involve the specific statutory requirements found in 29 U.S.C. § 160(b) nor the special policy considerations underlying those requirements.

(5) When a Federal statute imposes additional requirements beyond mere filing in order to commence an action, mere filing without satisfying those additional prerequisites cannot toll the limitations period.

———o———

B.

ARGUMENT

1. The Petition Does Not Present Special Or Important Reasons Warranting Review.

Rule 17 of the Court's Rules provides that a Petition for a Writ of Certiorari will only be granted where there are special and important reasons therefor. In the instant case, no such reasons exist.

Initially, there is no conflict among the Circuit Courts on the issue presented herein, and the one Circuit which has ruled on the issue has done so consistently, *Simon v. The Kroger Company, et al., supra; Howard v. Lockheed-Georgia Corporation, et al., supra; Dunlop v. Lockheed-Georgia Corporation, et al., supra.*

Furthermore, there has been no departure from a prior decision of this Court in the instant case. In *Del Costello v. International Brotherhood of Teamsters, supra,* the Court engrafted the six (6) month limitation period of 29 U.S.C. § 160(b) onto hybrid breach of contract/breach of duty of fair representation actions. However, a fair reading of *Del Costello* reveals that the Court was not presented with the issue of, and did not decide, whether the Plaintiff therein had satisfied the requirements of

29 U.S.C. § 160(b). The Eleventh Circuit's decision in the instant case is a logical extension of *Del Costello v. International Brotherhood of Teamsters, supra,* in that the Circuit Court required Plaintiff to satisfy the specific statutory requirements of 29 U.S.C. § 160(b) previously held by this Court to be applicable to actions of this type. A decision which, as discussed hereinafter, is consistent with the holdings in other cases involving Federal statutes which impose additonal requirements beyond mere filing of a complaint in order to commence an action, *United States v. Metles,* 356 U.S. 256 (1958).

As this Court has stated several times, the Writ of Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the Circuit Courts of Appeal, *Lane & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1922); *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70 (1955). No such situations are presented herein.

As to the special and important reasons for granting the Writ, the Court has stated that this implies a reach to problems beyond the academic or the episodic, *Rice v. Sioux City Memorial Park Cemetery, supra,* at 74. In light of amended Rule 4 of the Federal Rules of Civil Procedure, the Petition herein, at best, presents an episodic situation which does not warrant review.

In an effort to create conflicts between the Eleventh Circuit's holding herein and *Del Costello v. International Brotherhood of Teamsters, supra,* Petitioner asserts, without support or explanation, that the practical effect of the

Eleventh Circuit's decision herein will be to reduce the six (6) month limitation period applied to actions of this type to ninety (90) days. In reaching this conclusion, Petitioner further speculates, without any support in the record as to the facts of this case, that Defendants will avoid service of process. Such speculations do not warrant review by the Court.

2. The Circuit Court Correctly Affirmed The District Court's Dismissal In That Petitioner Failed To Satisfy The Service Requirement Of The Applicable Statute Of Limitations.

Is *Del Costello v. International Brotherhood of Teamsters, supra,* the Court held that the limitations period contained in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), governed hybrid breach of contract/breach of duty of fair representation actions brought against employers and Unions pursuant to 29 U.S.C. § 185. (The asserted basis for jurisdiction in the instant case.) In adopting this limitations period the Court noted that

> The N.L.R.B. has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices (citations omitted). We have twice declined to decide the correctness of the Board's position, and we need not address that question today (footnote omitted). Even if not all breaches of duty are unfair labor practices, however, the family resemblance is undeniable and indeed there is substantial overlap.
>
> *Del Costello v. International Brotherhood of Teamsters, supra,* at p. 2293.

Thus, noting the resemblance and overlap of district court actions alleging breach of the duty and breach of contract,

and an unfair labor practice charge raising the same allegation, the court adopted the limitations period found in 29 U.S.C. § 160(b) relative to unfair labor practices.

Not only did the Court note that the similarity of the rights asserted warranted adoption of the 10(b) limitations period, but the policy considerations favoring relatively rapid resolution of labor disputes also warranted adoption of the 10(b) requirements to an action such as the one herein, *Del Costello v. International Brotherhood of Teamsters, supra,* at p. 2292.

Section 10(b) expressly requires that a charge be both filed and served within six (6) months of the accrual of the action. As the District Court below noted, these requirements were imposed "to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere and recollection of the events in questions have become dim and confused . . . and of course to stabilize existing bargaining relationships" citing *Local Lodge No. 1424 International Association of Machinists v. National Labor Relations Board,* 362 U.S. 411 (1960) (quoting H.R. Rep. No. 245, 80th Cong., 1st sess. 40 [1947]). As the District Court below went on to note these special considerations relative to labor relations would be ill served if a party could toll the 10(b) limitations period by mere filing. Indeed, it is for these very policy reasons that "strict adherence to the Section 10(b) limitation" has been required, *National Labor Relations Board v. Preston H. Haskell Company,* 616 F.2d 136, 142 (CA 5, 1980). See also, *National Labor Relations Board v. Auto Warehousers, Inc.,* 571 F.2d 860 (CA 5, 1978); *National Labor Relations Board v. McCready & Sons, Inc.,* 482 F.2d 877 (CA 6, 1973).

In this latter regard, it is submitted that reversal of the decision below would lead to the danger that parties in the industrial setting would be uncertain as to the length of time they must maintain records relative to each and every grievance processed. Pursuant to the express wording of Section 10(b) employers and unions now have the stabilizing influence of a specific six (6) month limitation period. Reversal of the decision below would undermine that stability by allowing a litigant to toll the limitations period by *mere* filing of a complaint within six (6) months of the accrual of the action.

Contrary to the foregoing, Petitioner contends that Section 10(b) was not intended to apply to judicial proceedings and that the service requirements only apply in the administrative proceedings conducted by the National Labor Relations Board. However, this argument ignores the undeniable "family resemblance" and "substantial overlap" between breaches of the duty of fair representation (raised by Petitioner's action) and unfair labor practices, *Del Costello v. International Brotherhood of Teamsters, supra,* at 2293. In light of this resemblance and overlap, the policy considerations requiring compliance with 29 U.S.C. §160(b) are applicable regardless of the forum. To conclude otherwise would do little to foster the Federal policy favoring "the relatively rapid final resolution of labor disputes" *Del Costello v. International Brotherhood of Teamsters, supra,* at 2292.

In support of his Petition, Petitioner continues to rely upon the general rule expressed in *Caldwell v. Martin Marietta Corporation,* 632 F.2d 1184 (5th Cir., 1980), and similar cases, that the mere filing of a complaint tolls the running of the statutes of limitations in an action

based on Federal law. However, as noted by the District Court, that general rule governs only when the applicable statute of limitations requires that an action be "brought", "commenced", or "initiated" within a specified time. Unlike those cases, the instant statute required that the action be both filed (initiated, commenced) and *served* within the limitations period. In this regard, the cases relied upon by Petitioner do not involve express statutory requirements (or policy considerations) of the type involved herein.

The statute involved herein imposes very specific requirements for bringing the action. Requirements well rooted in the Federal policy relative to industrial stability. Where a Federal statute imposes additional requirements in order to commenec an action, the filing of a complaint without satisfying those additional prerequisites cannot toll the limitations period, Moores Federal Practice (2nd Ed.1983) § 3.04 at pp. 3-12. For example, in *United States v. Matles, supra,* the government had failed to file the affidavit showing good cause required by 8 U.S.C. §1451(a) in a denaturalization proceeding under the Immigration and Nationality Act. Although the complaint had been timely filed, the Court, rejecting the affidavit filed after the expiration of the statute of limitations, ruled that, "the affidavit must be filed with the complaint when the proceedings are instituted." As the affidavit was a statutory prerequisite to the proper commencement of an action, the failure to file a timely affidavit could not be cured by amendment, and the complaint was dismissed.

In the instant case, it cannot be denied that Petitioner failed to satisfy the service requirements of Section 10(b) and the Court below correctly dismissed the action.

CONCLUSION

On the basis of the foregoing the Petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

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(3)

No. 84-1427

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STEVEN D. SIMON,

Petitioner,

vs.

THE KROGER CO. and
GENERAL TEAMSTERS LOCAL 528,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT THE KROGER CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly determined that the limitations period set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b), specifying that a charge must be filed and served within six months, requires that a complaint alleging that an employer has breached its collective bargaining agreement and that a union has violated its duty of fair representation be served within six months.

2. Whether the Eleventh Circuit correctly determined that the District Court had properly interpreted its own Local Rule 91.2 in ruling that the failure of Steven D. Simon to file a timely response to the motion for summary judgment indicated that that motion was unopposed.

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STATEMENT OF THE CASE

Steven D. Simon was initially employed by The Kroger Co. as a warehouseman on September 6, 1978. In October, 1979, Simon became a member of the General Teamsters Union, Local 528 and was subject to the collective bargaining agreement between Kroger and that Union (R 5).[1]

On February 18, 1982, Simon was discharged by Kroger for carelessness, failure to follow instructions

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[1] References to the record are cited as "R ___", while "Appx. ___" denotes citations to the Appendix to the Petition for a Writ of Certiorari.

and deplorable work quality (R 30, 33, 39). After a grievance was filed and processed in accordance with the collective bargaining agreement, a joint Kroger-Union hearing was held in Chicago on May 25, 1982 (R 30, 33, 39, 63-64, 66-68). A decision denying Simon's grievance was subsequently issued pursuant to the terms of the bargaining agreement, and Simon received a copy of that decision on July 6, 1982 (R 31, 33-34, 39, 69).

The complaint in this matter was filed in the United States District Court for the Northern District of Georgia on January 3, 1983, alleging that Kroger had breached its collective bargaining agreement by discharging him and that the Union had violated its duty of fair representation by failing to represent him properly in connection with his grievance. The jurisdiction of the Court was invoked pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185 (R 3).

More than six months after Simon had been notified of the denial of his grievance, on January 12, 1983, a copy of that complaint was served on Kroger, and, on January 26, 1983, the Union was served with the complaint (R 10, 11).

THE PROCEEDINGS BELOW

Kroger filed its motion for summary judgment on June 10, 1983, noting that the action was barred by the applicable statute of limitations (R 33).[2] In support of that motion, Kroger relied on *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), in which the appropriate limitations period for suits brought under 29 U.S.C. Section 185 was determined to be the period during which a party could move for vacation of an arbitration award under state law.

[2] The Petitioner's representation that Kroger's motion was initially filed on July 5, rather than June 10, is patently erroneous (Petition, pp. 5, 15) and conflicts with the specific findings of the District Court and the Eleventh Circuit that "Simon failed to respond to Kroger's motion for summary judgment until almost three months after a response was required under Local Rule 91.2" (Appx. A-5, B-1, C-1).

While that motion was pending, the decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), was published. Accordingly, on July 5, 1983, Kroger filed a supplemental brief in support of its motion for summary judgment (R 134).

Without seeking an extension of time within which to respond or leave to file an untimely brief, Simon filed a brief in opposition to the motion on September 6, 1983, almost three months after the motion was originally filed and more than two months after the filing of Kroger's supplemental brief. No explanation for the delay was offered in Simon's response (R 139).

On September 27, 1983, the District Court granted Kroger's motion for summary judgment. As the complaint had not been served on Kroger within six months as required by Section 10(b) of the National Labor Relations Act, the action was time-barred. The District Court additionally ruled that the motion was to be considered unopposed in accordance with Local Rule 91.2 of the Rules of the United States District Court for the Northern District of Georgia (Appx. B-1).

After having filed a motion for reconsideration of the District Court's ruling, Simon, on November 23,

1983, first presented an excuse for having failed to comply with Local Rule 91.2. Rather than filing a response to the original summary judgment motion within twenty days as required by that Rule, Simon claimed to have "waited until he had, what he believed to be, a well thought out response before filing the same" (R 250). Citing "a duty . . . to refrain from filing a brief until he ha[d] thoroughly familiarized himself with the law and the facts and to not burden the system with meritless propositions" (R 254), Simon asserted that he had simply complied with that duty by having filed no response to the summary judgment motion.

In denying the request for reconsideration, the District Court, in an order dated December 22, 1983, noted that Simon had not "offered an explanation for his failure to seek an extension of the response time or leave to file an untimely response" (Appx. C-1). Concluding that its original decision concerning the application of Local Rule 91.2 was correct, the District Court stated that Simon's "apparently conscious decision to delay [his] response for more than two months strains the spirit of the federal rules to, if not beyond, the breaking point" (Appx. C-2).

The District Court also reconfirmed its previous holding that Section 10(b) requires that a complaint be filed and served within six months (Appx. C-2). Subsequently, on January 31, 1984, the District Court granted a separate summary judgment motion made by the Union, finding that the complaint had not been served within six months on that defendant either (Appx. D-1).

On October 15, 1984, the United States Court of Appeals for the Eleventh Circuit affirmed these rulings

(Appx. A-1), and a petition for rehearing and suggestion for rehearing en banc was denied on December 6, 1984 (Appx. F-1).

REASONS FOR DENYING THE WRIT

With no conflict among the Circuit Courts as to any of the questions presented, the Petitioner seeks to have this Court devote its resources to considering the unique factual issues presented here. For instance, without challenging the authority of the District Court to maintain and enforce its Local Rules, the Petitioner requests this Court to determine whether the application and interpretation of Local Rule 91.2 was proper in the particular circumstances involved in this case.

Not only would such a factual determination be wholly inconsequential outside the Northern District of Georgia, but the resolution of this matter would have little significance even locally. Local Rule 91.2 and all previous rules of the United States District Court for the Northern District of Georgia were rescinded and superseded by another set of Local Rules, effective January 1, 1985.[3] Virtually no one other than the litigants to this action could be affected by this Court's consideration of whether the now-repealed Local Rule 91.2 has been applied properly in this case.

Nor would another review by this Court of the appropriate limitations period in hybrid Section 301 ac-

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[3] While the requirements of former Local Rule 91.2 have been retained in Local Rule 220-1(b)(1) of the new Rules of the United States District Court for the Northern District of Georgia, the Petitioner does not claim that such rules are in any way improper or invalid. Instead, the Petitioner only suggests that former Local Rule 91.2 should not have been invoked by that Court in this particular case.

tions be of any special importance to anyone not involved in this action. The factual situation presented here involving a complaint filed, but not served within the statutory six-month period, has arisen only infrequently, and, as this Court has considered the issue of the appropriate limitations period in such cases twice in the past four years in both *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), these issues cannot warrant further review.

In any event, these same issues were fully considered and correctly decided by both the Eleventh Circuit and the District Court. As the Petitioner's arguments are meritless, the petition for a writ of certiorari should be denied.

I. Section 10(b) Requires Service Within Six Months

In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), this Court ruled that the applicable limitations period for purposes of a hybrid Section 301 suit is set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b). That provision expressly requires service of an unfair labor practice charge within six months.

In interpreting Section 10(b), both the NLRB and the Courts have consistently ruled that such charges must be both filed and served within the statutory six month period. *NLRB v. Local 264, Laborers' International Union*, 529 F.2d 778, 782 (8th Cir. 1976) ("the statute is clear in providing that a charge must not only be filed, it must also be served within the prescribed six month period"); *Old Colony Box Co.*, 81 NLRB 1025, 1027 (1949) ("the charge must have been

filed and a copy thereof actually served upon the party against whom it was made within 6 months").

While conceding that Section 10(b) applies here, the Petitioner asserts that the service requirements of the statute apply only in administrative proceedings conducted by the NLRB. According to the Petitioner, the NLRB rules authorizing service by mail, 29 C.F.R. Section 102.113(a), somehow demonstrate that the statutory service requirement is inapplicable here. That argument ignores not only NLRB case law developed prior to the promulgation of that rule which specified that service was complete upon actual receipt (*NLRB v. Friedman-Harry Marks Clothing Co.*, 83 F.2d 731 (2d Cir. 1936); *George D. Auchter Co.*, 102 NLRB 881, 883 n. 8 (1953), *enf'd.*, 209 F.2d 273, 275 (5th Cir. 1954)), but also the means of perfecting service by mail under Rule 4 of the Federal Rules of Civil Procedure.

The Petitioner does not cite a single case involving the application of a limitations period comparable to Section 10(b), instead relying exclusively upon cases indicating that an action is generally commenced at the time a complaint is filed. Where no additional statutory requirements are applicable, service need not be accomplished in order to toll the statute of limitations, and the cases cited by the Petitioner apply that general rule. With a statute of limitations simply requiring that an action be "brought" (*Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184 (5th Cir. Unit B 1980); *Issacks v. Jeffers*, 144 F.2d 26 (10th Cir.), *cert. denied*, 323 U.S. 781 (1944)), "commenced" (*Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gasoline Co.*, 347 F.2d 921 (8th Cir. 1965), *cert. denied*, 383

U.S. 925 (1966); *Messinger v. United States*, 231 F.2d 328 (2d Cir. 1956)), or "filed" (*United States v. Wahl*, 583 F.2d 285 (6th Cir. 1978)) within a prescribed period, the mere filing of the complaint tolls the statute.[4] Unlike those statutes, Section 10(b) expressly requires both filing and service within six months, and those cases are inapposite here.

Where a federal statute imposes additional requirements in order to commence an action, the filing of a complaint without satisfying those additional prerequisites cannot toll the limitations period. *United States v. Matles*, 356 U.S. 256 (1958) (where an affidavit of good cause is a statutory prerequisite to commencing an action, a timely-filed complaint without such an affidavit did not toll the limitations period, and this defect could not be cured by amendment); *2 Moore's Federal Practice* ¶ 3.04, p. 3-21 (2d ed. 1984).

Here, Section 10(b) requires not only filing, but also service of a complaint within six months. Nothing in *DelCostello* indicates that this Court intended for only a portion of that statute to apply to Section 301 actions, and each of the courts expressly considering the issue has agreed that the service requirements of that limitations period are applicable to such suits.[5] *How-*

[4] Contrary to the Petitioner's assertion, Rule 3 of the Federal Rules of Civil Procedure "simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." *4 C. Wright & A. Miller, Federal Practice and Procedure* § 1057, p. 191 (1969).

[5] While *Williams v. E.I. duPont de Nemours & Co.*, 581 F. Supp. 791 (M.D. Tenn. 1983), did apply only the filing requirements of Section 10(b), there is no indication that the service requirements of the statute were considered by the Court. Rather,

ard v. Lockheed-Georgia Co., 742 F.2d 612 (11th Cir. 1984); *Dunlap v. Lockheed-Georgia Co.*, Case No. 84-8329 (11th Cir. 1984); *Hoffman v. United Markets, Inc.*, 117 L.R.R.M. (BNA) 3229 (N.D. Cal. 1984). As service was not accomplished within the statutorily prescribed period, the decision of the Eleventh Circuit was correct, and the petition for a writ of certiorari should be denied.[6]

II. Failure To Comply With Local Rule 91.2.

Title 28 U.S.C. Section 2071 and Rule 83 of the Federal Rules of Civil Procedure expressly authorize district courts to adopt local court rules. *Transamerica Corp. v. Transamerica Bancgrowth Corp.*, 627 F.2d 963 (9th Cir. 1980). Once adopted, such local rules of practice are binding upon parties in actions before the courts, and they have the force and effect of law. *Biby v. Kansas City Life Insurance Co.*, 629 F.2d 1289 (8th Cir. 1980); *Woods Construction Co. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888 (10th Cir. 1964). Such rules are primarily promulgated to promote the efficiency of the district courts, and those courts have a large measure of discretion in interpreting and applying them. *United States v. Simmons*, 476 F.2d 33 (9th Cir. 1973). A district court "is, of course, the best

that Court decided that the plaintiff's having purposely avoided serving the complaint on the defendants did not trigger the statute of limitations after the complaint had been filed, and no mention of the specific Section 10(b) service requirement is contained in that opinion.

[6] The Petitioner's contention that having to serve a complaint within the prescribed six-month period unduly curtails the statute of limitations is meritless. In a Section 301 action, with neither his employer nor his union being a stranger to the plaintiff, service can be accomplished expeditiously under Rule 4.

judge of its own rules." *United States Fidelity & Guaranty Co. v. Lawrenson*, 334 F.2d 464, 467 (4th Cir.), *cert. denied*, 379 U.S. 869 (1964).

Having admittedly failed to comply with the local rules of the Court, the Petitioner apparently believes that such deliberate violations must be sanctioned. *See Allen v. United States Fidelity & Guaranty Co.*, 342 F.2d 951, 954 (9th Cir. 1965) ("It is for the court in which a case is pending to determine . . . what departures from . . . rules of court are so slight and unimportant that the sensible treatment is to overlook them.").

The Petitioner's "conscious decision to delay its response for more than two months" in direct contravention of the local rules was neither slight nor unimportant. Even now, he has offered no explanation for his failure to seek an extension while the motion was pending nor can he justify not requesting leave to file an untimely brief. Such purposeful violations warrant the imposition of the sanctions specified in the local rules, and, accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Respondent Kroger respectfully submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

STEVEN D. SIMON *v.* KROGER COMPANY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84–1427. Decided April 29, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Section 10(b) of the National Labor Relations Act limits the time for filing an unfair labor practice charge with the National Labor Relations Board. It provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." 29 U. S. C. § 160(b). The plain words require that a charge be both filed *and* served within six months of the challenged conduct, and such has long been the Board's interpretation. See, *e. g.*, *Old Colony Box Co.*, 81 N. L. R. B. 1025, 1027 (1949). Service may be accomplished merely by mailing a copy of the charge. See 29 CFR § 102.113(a) (1984).

In *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), we held that § 10(b) governs an employee's suit against his employer for breach of contract and his union for breach of its duty of fair representation. We did not discuss whether that section's requirement of service, as well as filing, within the 6-month period also applies in such a suit. That is the question raised in this petition.

The Kroger Co. (Kroger) discharged petitioner on February 18, 1982. Grievance procedures were unsuccessful, and on July 6, 1982, the union notified petitioner that it would not proceed to arbitration. The following January 3, just within the 6-month period, petitioner filed this § 301 action in Fed-

eral District Court. See 29 U. S. C. § 185. On January 12, after the 6-month period had run, he served a copy of the complaint on Kroger; and on January 25, he served the union. Applying *DelCostello*, and relying on the plain words of § 10(b), the District Court granted both defendants' motions for summary judgment on the ground that the action was time-barred. It also found that petitioner had not filed a timely response to Kroger's motion for summary judgment and that under a local rule he would be deemed not to oppose it.

The Court of Appeals for the Eleventh Circuit affirmed. 743 F. 2d 1544 (1984). Referring to the "intent, spirit, and plain language of section 10(b)," it held that a § 301 complaint must be both filed and served within the 6-month period. *Id.*, at 1546. It also found that the District Court had properly applied its local rule in treating Kroger's motion for summary judgment as unopposed.

The lower courts agree that a suit in federal court on a federal cause of action is commenced, and the statute of limitations tolled, upon the filing of the complaint. See, *e. g.*, *Hobson* v. *Wilson*, 737 F. 2d 1, 44 (CADC 1984); Fed. Rule Civ. Proc. 3.; 2 J. Moore & J. Lucas, Moore's Federal Practice ¶3.07[4.–3–2] (1984). While the time for service of process is not open-ended, see Fed. Rules Civ. Proc. 4(a), 4(j), it need not occur within the limitations period. Ordinary federal practice thus conflicts with the specific terms of this borrowed statute of limitations. In light of this inconsistency, the brevity of the limitations period, and the fact that § 10(b) was not intended to apply to judicial proceedings, the result below is not obviously correct. In practical effect, the Eleventh Circuit's ruling shortens the 6-month period by the amount of time necessary to effect service under the Federal Rules. Section 10(b) does not have a similar impact in administrative proceedings, in which service is accomplished

merely by placing a copy of the charge in the mail. Compare Fed. Rule Civ. Proc. 4 with 29 CFR § 102.113(a) (1984).

This issue has come before the Eleventh Circuit more than once, see *Howard* v. *Lockheed-Georgia Co.*, 742 F. 2d 612 (CA11 1984), and it may be expected to recur. At least one District Court in another Circuit has reached the contrary conclusion. See *Williams* v. *E. I. duPont de Nemours Co.*, 581 F. Supp. 791 (Tenn. 1983). A panel of the Sixth Circuit held that a complaint filed at the 5-month, 27-day mark was timely, without pausing to consider whether the defendants had been served within the subsequent four days. *Smith* v. *General Motors Corp.*, 747 F. 2d 372 (1984).

This problem is a necessary corollary to the decision in *DelCostello*. It is worth settling quickly and dispositively. I would therefore grant the petition and set the case for oral argument.[1]

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[1] The decision below also rests on petitioner's failure to respond to Kroger's motion for summary judgment. However, this ruling applies only to Kroger; the judgment in favor of the union rests solely on the statute of limitations holding. In any event, the presence of an alternative holding does not reduce the precedential effect of the § 10(b) holding or make it any less the authoritative judgment of the Court of Appeals. See *Richmond Co.* v. *United States*, 275 U. S. 331, 340 (1928); *Union Pacific R. Co.* v. *Mason City & Fort Dodge R. Co.*, 199 U. S. 160, 166 (1905).